Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

BURLINGTON AIR EXPRESS, INC.,

Petitioner,

vs.

GEORGIA PACIFIC CORPORATION and BTL SPECIALTY RESINS CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR A WRIT OF CERTIORARI

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Lutz Appellate Services, inc.
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QUESTIONS PRESENTED FOR REVIEW

In the instant case, Georgia courts allowed attorneys fees in an air cargo case which they held was authorized by the Interstate Commerce Act, although the Airline Deregulation Act placed air cargo carriers outside the jurisdiction of any regulatory commission or agency. The questions presented by the rulings of the Georgia appellate courts in this case are:

(a) Are air cargo carriers controlled by the provisions of the Interstate Commerce Act as stated in the rulings in this case?

(b) Are air cargo carriers subject to the provisions of the Airline Deregulation Act?

(c) Are air cargo carriers controlled by Federal Common law without the application of *any* specific act?

(d) Where no law or interpretation of law presently allows attorneys fees in air cargo claims (*other than the rulings being appealed in this case*), may attorneys fees be properly awarded in an air cargo claim case?

PARTIES TO THE PROCEEDINGS

All parties to this proceeding and all parent companies and nonwholly owned subsidiaries are included in the caption of this case.

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No.

In The

Supreme Court of the United States

October Term, 1995

BURLINGTON AIR EXPRESS, INC.,

Petitioner,

vs.

GEORGIA PACIFIC CORPORATION and BTL SPECIALTY RESINS CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia

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PETITION FOR A WRIT OF CERTIORARI

Burlington Air Express, Inc. respectfully petitions for a writ of certiorari to review the judgment of the of the Court of Appeals of the State of Georgia.

OPINIONS BELOW

1. Superior Court of Fulton County Order granting Final Partial Summary Judgment to Plaintiffs and Denying Defendant's Cross Motion for Partial Summary Judgment dated November 10, 1992. This is unreported.

2. Court of Appeals of Georgia decision on Motion for Reconsideration dated September 27, 1993. Judgment affirmed in part, reversed in part. Reported at 211 Ga. App. 113, 438 S.E. 2d 97.

3. Court of Appeals of Georgia denying Motion for Reconsideration dated November 23, 1993. Unreported.

4. Supreme Court of the State of Georgia denied Petition for Certiorari dated January 28, 1994. Unreported.

5. Supreme Court of Georgia, denial of Motion for Reconsideration dated February 18, 1994. Unreported.

6. Superior Court of Fulton County — Final Judgment dated May 12, 1994. Unreported.

7. Court of Appeals of Georgia — Decision dated April 5, 1995, reported in 217 Ga. App. 312, 457 S.E. 2d 219.

8. Court of Appeals of Georgia — Motion for Reconsideration denied April 24, 1995. Unreported.

9. Supreme Court of Georgia — Petition for Certiorari denied July 14, 1995. Unreported.

10. Supreme Court of Georgia Motion for Reconsideration denied July 28, 1995. Unreported.

11. Court of Appeals of Georgia — Motion for Supersedeas denied August 24, 1995. Unreported.

12. Supreme Court of Georgia — Motion for Supersedeas denied September 1, 1995. Unreported.

STATEMENT OF JURISDICTION

The Court of Appeals of the State of Georgia entered its judgment on April 5, 1995. The Court of Appeals denied reconsideration on April 24, 1995. The Supreme Court of Georgia denied certiorari on July 14, 1995. The Supreme Court denied reconsideration on July 28, 1995. The Court of Appeals denied supersedeas on August 24, 1995. The Supreme Court denied supersedeas on September 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Supreme Court Rules 10.1(b) and (c).

STATUTES INVOLVED

49 U.S.C.A. § 105260(a) 8B:

> (T)he Interstate Commerce Commission does not have jurisdiction under this Chapter —
>
> Transportation of Property (including baggage) by motor vehicle as a part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier . . .

Airline DeRegulation Act of October 24, 1978, 92 Stat. § 1705 repealed the **Federal Aviation Act of 1958, 49 U.S.C. §§ 1301, *et seq.*, 49 U.S.C. §§ 1371, 1376.**

49 U.S.C.A. § 41501:

> . . . [E]very carrier and foreign air carrier shall establish, comply with and enforce
>
> 1. Reasonable prices, classifications, rules and practices related for foreign air transportation; and
>
> 2. For joint prices established for foreign air transportation reasonable divisions of those prices among the participating air carriers for foreign air carriers without unreasonably discriminating against any other carriers.

49 U.S.C. § 40101:

> . . . [I]n carrying out Sub-part II of this part and those provisions of Sub-part IV applicable in carrying our Sub-part II, the Secretary of Transportation shall consider the following matters among others as being in the public interest and consistent with public convenience and necessity:
>
> * * *
>
> (6) placing maximum reliance on competitive market forces and on actual and potential competition — (a) to provide for the need Air

Transportation System; and (b) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital considering any material differences between interstate air transportation and foreign air transportation.

* * *

4. The availability of a variety of adequate, economic, efficient and low priced services without unreasonable discrimination or unfair or deceptive practices.

9. Preventing unfair deceptive, predatorial, anti-competitive prices in air transportation.

12. Encouraging, developing and maintaining an air transportation system relying on actual and potential competition —

a. To provide efficient innovation and low prices;

b. To decide on a variety and quality of and determine prices for air transportation services.

Public Laws 95th Congress, Second Session 1978, 92 Stat. §§ 3(a) & 102(a) of The Federal Aviation Act of 1958, (*49 U.S.C. § 1302) (a)*) as amended to read as follows:

> Factors for interstate and overseas air transportation.
>
> Section 102(a) in the exercise and performance of its powers and duties under this act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity . . .
>
> * * *
>
> (3) The availability of a variety of adequate, economic, efficient, and low price services by air carriers without unjust discrimination, undue preferences or advantages or unfair or deceptive practices . . .

Public Laws 95th Congress, Second Session 1978, 92 Stat. § 1707, "Federal Preemption"

> **Section 4(a) Title I** — Under the **Federal Aviation Act of 1958 (49 U.S.C. § 301, *et seq.*)** as amended by adding at the end thereof the following new section:
>
> Federal Preemption
> Preemption

49 U.S.C. § 1305(a)(1):

> . . . [E]xcept as provided in paragraph 2 of this sub-section, no state of political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard or other provision having the force and effects of law relating to rates, routes or services of any air carrier having authority under Title IV of this act to provide interstate air transportation.

49 U.S.C. § 10762(a)(1):

> . . . [A] carrier providing transportation for service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates established under this Chapter for transportation or service it may provide under this sub-title.

STATEMENT OF THE CASE

This case was initiated as a claim for lost cargo. On November 10, 1992, the Honorable Judge of the Superior Court of Fulton County, Georgia granted partial summary judgment to the Respondents on the cargo loss claim and allowed proof of attorneys fees and punitive damages before a jury.

On appeal, the Court of Appeals of Georgia reversed the ruling and granted the Petitioner's Motion for Summary Judgment on the claim for punitive damages, but allowed the Respondents the damages for the lost cargo and allowed the Respondents to present to the jury the question for attorneys fees. Certiorari was applied for to the Georgia Supreme Court which was denied [January 28, 1994] as was the Motion for Reconsideration. [February 18, 1994]

After a trial, the Superior Court awarded attorneys fees. The award was affirmed on appeal to the Georgia Court of Appeals with rehearing denied [April 24, 1995] and the Petition for Certiorari to the Georgia Supreme Court and Motion for Rehearing denied [July 14, 1995] [July 28, 1995].

In its ruling, the Georgia Court of Appeals stated, "although DeRegulation took Air Cargo Carriers outside the jurisdiction of any regulatory commission or agency, the body of laws and principles expressed in the Act continues to be applicable to air carriers as Federal Common Law." *See also, First Pennsylvania Bank, N.A. v. Eastern Airlines*, 731 F.2d 1113 (3rd Cir. 1984); *Burlington Air v. Georgia Pacific*, 211 Ga. App. 113, 438 S.E. 2d 97.

The Petitioner herein brought to the Court's attention the case of *Arkwright-Boston v. Great Western Airlines*, 767 F.2d 425 (8th Cir. 1985). This case held that the Interstate Commerce Act has never applied to air carriers.

REASONS FOR GRANTING THE WRIT

THE GEORGIA COURTS HAVE ALLOWED SHIPPERS OF AIR CARGO TO RECOVER ATTORNEYS FEES WITH THE ERRONEOUS APPLICATION OF THE INTERSTATE COMMERCE ACT TO AIR CARGO CASES.

By applying the Interstate Commerce Act, the Georgia courts essentially rendered the Airline Deregulation Act void in Georgia courts. Moreover, this interpretation gives a preference to shippers in Georgia by allowing attorneys fees which are not available to shippers in other states. This is contrary to all of the Airline Deregulation Act provisions and purposes. In addition, it is contrary to the ruling of the United States Court of Appeals for the Eighth Circuit in the case of *Arkwright-Boston v. Great Western Airlines*, 767 F.2d 425 (8th Cir. 1985) which holds that the Interstate Commerce Act has never applied to air cargo claims. No law or interpretation of law presently allows attorneys fees in air cargo claims.

The case is important to all air cargo carriers who operate in the State of Georgia who are subjected to claims for attorneys fees for lost or damaged cargo which is not allowed in any other state or foreign country.

By applying the Interstate Commerce Act in air cargo cases, the Georgia courts have also given shippers an argument in favor of requiring air cargo carriers to publish their rates in tariffs filed with the Interstate Commerce Commission as required by that Act. 49 U.S.C. § 10762. This is contrary to the Airline Deregulation Act provision which only required the air cargo carrier to provide for the availability of a variety of "adequate economic and low price services by air carriers without unjust discrimination, undue preferences or advantages or unfair deceptive practices." 92 Stat. § 3(a)(3).

It is important to nullify the dichotomy created by this erroneous application of the Interstate Commerce Act created by the Georgia appellate courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

FRED S. CLARK
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APPENDIX A — ORDER OF THE SUPREME COURT OF GEORGIA DATED SEPTEMBER 1, 1995

SUPREME COURT OF GEORGIA

Case No. S95C1278

Atlanta September 1, 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

BURLINGTON AIR EXPRESS v. GEORGIA PACIFIC CORP.

Upon consideration of appellant's Motion for Supersedeas, it is ordered that the motion is denied, as it is without merit, and as this Court is without jurisdiction over this matter, the remittitur having been transferred to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Lynn M. Stinchcomb, Chief Deputy Clerk

APPENDIX B — ORDER OF THE COURT OF APPEALS OF GEORGIA DATED AUGUST 24, 1995

Court of Appeals
of the State of Georgia

ATLANTA, AUG 24 1995

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A95A0462. BURLINGTON AIR EXPRESS, INC. v. GEORGIA PACIFIC CORP. et al.

Upon consideration of appellant's motion for supersedeas, the motion is hereby DENIED.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta AUG 24 1995

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.
s/ William C. Martin

APPENDIX C — ORDER OF THE SUPREME COURT OF GEORGIA DATED JULY 28, 1995

SUPREME COURT OF GEORGIA

Case No. S95C1278 Atlanta, July 28, 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BURLINGTON AIR EXPRESS, INC. V. GEORGIA PACIFIC CORP., ET

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hines, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Sherie M. Welch, Clerk.

APPENDIX D — ORDER OF THE SUPREME COURT OF GEORGIA DATED JULY 14, 1995

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: July 14, 1995

Fred S. Clark
CLARK & CLARK
P.O. Box 8151
Savannah GA 31412

Case No. S95C1278

BURLINGTON AIR EXPRESS, INC. V. GEORGIA PACIFIC CORP., ET AL.

COURT OF APPEALS CASE NO. A95A0462

The Supreme Court today denied the petition for certiorari in this case.

Benham, C.J., Fletcher, P.J., Sears, Hunstein, Carley and Thompson, JJ., concur.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX E — ORDER OF THE COURT OF APPEALS OF GEORGIA DATED APRIL 24, 1995

Court of Appeals
of the State of Georgia

ATLANTA, APRIL 24, 1995

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed.

Case No. A95A0462

BURLINGTON AIR EXPRESS, INC. V. GEORGIA PACIFIC CORPORATION ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that It be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta APR 24 1995

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ William C. Martin Clerk.

APPENDIX F — ORDER OF THE COURT OF APPEALS OF GEORGIA DATED APRIL 5, 1995

SECOND DIVISION
BIRDSONG, P. J.,
JOHNSON and SMITH, JJ.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

April 5, 1995

In the Court of Appeals of Georgia

A95A0462. BURLINGTON AIR EXPRESS, INC. v. GEORGIA-PACIFIC CORPORATION, et al.

SM-031

SMITH, Judge.

This is the second appearance of this case before us. In *Burlington Air Express v. Georgia-Pacific Corp.*, 211 Ga. App. 113 (438 SE2d 97) (1993) (*Burlington I*), this court affirmed a grant of partial summary judgment to Georgia-Pacific for compensatory damages for breach of contract, including pre-judgment interest. The issue of Burlington's liability for attorney fees was reserved for determination at trial. Burlington now seeks review of the court's final judgment, entered following a bench trial, awarding to Georgia-Pacific its litigation expenses and attorneys' fees in the amount of $25,295.35.

Appendix F

Burlington contends the trial court erred by denying its motion for directed verdict on the claim for attorney fees under OCGA § 13-6-11 and awarding attorney fees to Georgia-Pacific. Burlington argues its refusal to pay in excess of $500 for Georgia-Pacific's claims was founded on a bona fide defense, it further maintains that the attorney fees award should be vacated because it was based on inadmissible evidence concerning settlement negotiations between the parties.

" 'The issue of attorney fees under OCGA § 13-6-11 is a question for the (factfinder) and an award will be upheld if any evidence is presented to support the award. (Cit.)' [Cit]." *Leventhal v. Seiter,* 208 Ga. App. 158, 164 (7) (430 SE2d 378) (1993). "OCGA § 13-6-11 provides for expenses of litigation where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." *McDonald v. Winn,* 194 Ga. App. 459, 459 (1) (390 SE2d 890) (1990). Bad faith warranting an award of attorney fees "must have arisen out of the transaction on which the cause of action is predicated." Id. Moreover, we have noted that "there may be bad faith in carrying out the provisions of the contract sufficient to support the award." *Jordan Bridge Co. v. I. S. Bailey Jr. Inc.,* 164 Ga. App. 124, 126 (5) (296 SE2d 107) (1982). Finally, "[d]espite the existence of a bona fide controversy as to liability, a [factfinder] may find that defendant 'acted in the most atrocious bad faith in his dealing with the plaintiff.' [Cits.]" *Fidelity National Bank v. Kneller,* 194 Ga. App. 55, 63 (3) (390 SE2d 55) (1989).

The underlying litigation in this case arises from Burlington's handling, as self-insurer, of claims by Georgia-Pacific and BTL Specialty Resins for the declared value of five lost shipments of scrap silver screen sent via Burlington Air

Express to a refinery in Massachusetts to be refined and ultimately reused in the manufacture of formaldehyde. Despite having collected extra value charges for four of the five insured shipments, Burlington refused to pay their declared value on the basis of a tariff restriction in small print on the back of the airbills that limits the carrier's liability for shipments of "precious metals" to $500. See *Burlington I*, supra, at 114-115 (2). Georgia-Pacific and BTL were not made aware of the tariff restrictions before shipment and were not provided a copy of the tariff itself until well after Burlington had denied liability in excess of $500 on each claim. Id.

The small print on the back of the airbills also provided that shipments of manufactured articles or components containing precious metals with a functional rather than a decorative or ornamental use would be accepted with a maximum declared value of $25,000. The trial court found that Burlington exhibited bad faith when it attempted to limit to $500 its liability for Georgia-Pacific's lost shipments of scrap silver screens as "precious metals" without reference to the possible applicability of this exception for nondecorative precious metals. The court also found Burlington caused Georgia-Pacific unnecessary trouble and expense in litigation, warranting the recovery of attorney fees, by continuing to rely on the tariff's limitation of liability to less than the declared value of Georgia-Pacific's shipments in the face of clear legal authority in the Eleventh Circuit prohibiting such limitations unless the shipper was made specifically aware the tariff restrictions were incorporated in the carrier contract.

Our review of the record reveals evidence supporting the trial court's finding that Burlington exhibited bad faith by attempting to limit its liability for each of the five shipments to

$500 under its tariff without disclosure of the tariff's terms to the shipper. Although Burlington maintains the correspondence between it and Georgia-Pacific regarding the shipper's attempt to recover the declared value of its lost cargo concerned settlement negotiations and was therefore inadmissible, the correspondence evidences the carrier's bad faith in carrying out the terms of the carrier contract between the parties and is admissible for that purpose. See *Ostroff v. Coyner,* 187 Ga. App. 109, 116 (5) (369 SE2d 298) (1988). Since the record contains some evidence of bad faith, Burlington's argument regarding the existence of a bona fide controversy is irrelevant. *Kneller,* supra.

Judgment affirmed. Birdsong, P. J. and Johnson, J., concur.

APPENDIX G — ORDER OF THE SUPERIOR COURT OF FULTON COUNTY, STATE OF GEORGIA FILED MAY 12, 1994

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO. D90701

GEORGIA-PACIFIC CORPORATION and BTL SPECIALTY RESINS CORPORATION,

Plaintiffs,

v.

BURLINGTON AIR EXPRESS, INC.,

Defendant.

FINAL JUDGMENT

This matter came before the Court for trial on May 3, 1994. Most of the case had been resolved in Plaintiffs' favor on summary judgment, which Judgment against Defendant was affirmed, in relevant part, on appeal. The only issue to be resolved at trial was Plaintiffs' claim for attorney's fees and expenses against Defendant pursuant to O.C.G.A. § 13-6-11.

The parties waived trial by jury, having the Court to sit as fact finder. The Court considered all evidence presented by both sides, and the parties waived findings of fact and conclusions of law.

The Court rules in Plaintiffs' favor, and against Defendant,

finding that Defendant acted in bad faith toward Plaintiffs, under the meaning set forth in O.C.G.A. § 6-13-11, in the carrying out of the agreements entered into by the parties. Defendant's repeated representations to Plaintiffs as to the terms of its tariff that allegedly limited Defendant's liability were inconsistent with the actual language of the tariff, as Plaintiffs discovered when the tariff was finally produced by Defendant. The Court also finds that Defendant was stubbornly litigious, in that Defendant accepted Plaintiffs' shipments, charged Plaintiffs' therefor, including excess value charges to insure the shipments, and then Defendant refused to pay the full insured values of the shipments, without any just reason or defense, when Defendant lost the shipments. This constitutes stubborn litigiousness and caused Plaintiffs unnecessary trouble and expense within the meaning of O.C.G.A. § 13-6-11. Thus, the Court finds that Plaintiffs are entitled to a Judgment against Defendant for their attorney's fees and expenses incurred in this litigation pursuant to O.C.G.A. § 13-6-11.

The Court finds the amount of Plaintiffs' attorney's fees and expenses to be reasonable, particularly in light of the strenuous defenses set up by Defendant, many of which were wholly unrelated to the tariff excuse given by Defendant prior to litigation, and all of which the Court invalidated on summary judgment, finding no bona fide dispute. Thus, the Court awards Plaintiffs a Judgment against Defendant in the following amounts:

$20,963.78	Attorney's fees and expenses for Parker, Johnson, Cook & Dunlevie before trial
2,000.00	Attorney's fees for Michael Whitcombe's trial preparation and expense

Appendix G

731.57	Airfare and hotel expense for Michael Whitcombe
600.00	Attorney's fees for Douglas Roberto's trial appearance
900.00	Attorney's fees for Parker, Johnson, Cook & Dunlevie for trial
100.00	Expenses for Parker, Johnson, Cook & Dunlevie for trial
$25,295.35	TOTAL FINAL JUDGMENT

This Judgment is final and resolves this entire case. The Judgment shall bear interest from the date of this Final Judgment at the legal rate. Plaintiffs are also awarded costs of this action as a part of this Judgment.

SO ORDERED, this 11th day of May, 1994.

s/ Thelma Wyatt Cummings-Moore
HON. THELMA WYATT CUMMINGS-MOORE
SUPERIOR COURT OF FULTON COUNTY

Presented by:

PARKER, JOHNSON, COOK & DUNLEVIE

By: s/ Everett W. Gee
Everett W. Gee III, Esq.
State Bar No. 288586
Attorneys for Plaintiffs

Appendix G

Suite 700
1275 Peachtree Street N.E.
Atlanta, Georgia 30309
(404) 872-7000

Agreed to as to form:

CLARK & CLARK

By: Fred S. Clark
Fred S. Clark, Esq.
State Bar No._____
Attorneys for Defendant
24 Drayton Street, Suite 500
Savannah, Georgia 31402
(912) 233-0300

APPENDIX H — ORDER OF THE SUPREME COURT OF GEORGIA DATED FEBRUARY 18, 1994

SUPREME COURT OF GEORGIA

ATLANTA, FEBRUARY 28, 1994

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S94C0346
BURLINGTON AIR EXPRESS, INC. V. GEORGIA-PACIFIC CORP., ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

APPENDIX I — ORDER OF THE SUPREME COURT OF GEORGIA DATED JANUARY 28, 1994

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: JANUARY 28, 1994

Fred S. Clark
CLARK & CLARK
P.O. Box 8151
Savannah GA 31412

Case No. S94C0346

BURLINGTON AIR EXPRESS, INC. V. GEORGIA-PACIFIC CORP., ET AL.

COURT OF APPEALS CASE NO. A93A1153

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

APPENDIX J — ORDER OF THE COURT OF APPEALS OF GEORGIA DATED NOVEMBER 23, 1993

Court of Appeals
of the State of Georgia

ATLANTA, NOVEMBER 23, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed.

Case No. A93A1153

BURLINGTON AIR EXPRESS, INC. V. GEORGIA-PACIFIC CORPORATION ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta NOV 23 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Victoria M. Laughlin *Clerk.*

APPENDIX K — ORDER OF THE COURT OF APPEALS OF GEORGIA DATED SEPTEMBER 27, 1993

SECOND DIVISION
POPE C.J.
BIRDSONG, P.J., ANDREWS, J.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed.
(Court of appeals rules 4 and 48, March 1, 1985)

In the Court of Appeals of Georgia

A93A1153. BURLINGTON AIR EXPRESS, INC. v. GEORGIA PACIFIC CORPORATION et al.

POPE, Chief Judge. P-076

Plaintiffs Georgia Pacific Corporation ("GP") and BTL Specialty Resins Corporation ("BTL") are producers of formaldehyde. Silver is used as a catalyst in the production process and after use, the scrap silver may be refined and reused. In late 1989 and early 1990, plaintiffs contracted with defendant Burlington Air Express, Inc., a common air carrier, to transport five shipments of scrap silver to a refinery in Massachusetts. When these shipments were lost, defendant refused to pay plaintiffs the full declared value of the scrap silver, relying on provisions of its airbill and governing tariff which defendant said limited its liability. Plaintiffs then brought this action for compensatory damages, punitive damages and attorney fees, alleging breach of contract and conversion, and the parties filed cross-motions for partial summary judgment. The trial court denied defendant's motion and granted plaintiffs' motion for

summary judgment with respect to defendant's liability for compensatory damages, and defendant appeals.

1. Defendant contends the trial court erred in applying the provisions of the Interstate Commerce Act, 49 USCA § 101 et seq., to a case involving the transport of cargo by air. Specifically, defendant contends that since the air transport industry has been deregulated, it is not governed by the Act. In *Ragsdale v. Airborne Freight Corp.*, 173 Ga. App. 48 (1) (325 SE2d 428) (1984), however, this court recognized (a) that since deregulation, federal law continues to govern the enforceability of limitation provisions in airbills and (b) that although deregulation took air cargo carriers outside the jurisdiction of any regulatory commission or agency, the body of laws and principles expressed in the Act continues to be applicable to air carriers as federal common law. See also *First Pennsylvania Bank. N. A. v. Eastern Airlines Inc.*, 731 F2d 1113 (3d Cir. 1984). Accordingly, the trial court did not err in looking to the Act to answer various questions raised in this case.

2. For each of the five shipments, the record contains an airbill and invoice. The airbills and invoices for the first and third shipments show a declared value of $8,000, a specific instruction to insure the shipment for $8,000 and a charge assessed by defendant for the extra value of the cargo. The documents for the second shipment also show a declared value of $8,000 and a specific instruction to insure for that amount, but the invoice does not show an extra value charge. For the fourth shipment the box on the airbill for declared value is left blank; however, there is a special instruction to "insure for $6,500" above the empty declared value box on the airbill. Moreover, the invoice for that shipment lists a declared value of $6,500 and assesses an extra value charge. The documents for the last shipment show a

declared value of $6,500, a special instruction to insure for $6,500 and an extra value charge. The first three shipments were from BTL; the latter two were from GP.

The airbills, in small print on their reverse side, incorporate by reference the terms of defendant's tariff. Defendant argues that these terms limit recovery for a lost shipment of precious metal to $500. Under federal common law as reflected in the Interstate Commerce Act, however, a carrier cannot limit his liability to less than the declared value of the shipment by the inconspicuous incorporation of a tariff provision "unless it is shown that the shipper was specifically aware of it." *Bio-Lab. Inc. v. Pony Express Courier Corp.*, 911 F2d 1580, 1583 (11th Cir. 1990). Moreover, this rule that the carrier is liable for the full declared value applies even if, as appears to be the case with one of BTL's shipments, the carrier fails to charge a higher rate to compensate for its higher risk. See id. at 1584. In this case, it is undisputed that plaintiffs were not specifically aware of the tariff provision defendant relies on; it follows, therefore, that it is not enforceable against them.

Defendant asserts that at least the recovery for the GP shipment for which the declared value box was left empty should be limited, asserting that "[b]y leaving the declared value section blank, [plaintiff] limited its expectation of recovery to an amount [provided on the back of the airbill]." *Uniden Corp. of Am. v. Federal Express Corp.*, 642 FSupp 263 (M. D. Pa. 1986). However, this assertion is belied by the presence of the special instruction to insure for $6,500 above the empty declared value box, the declared value of $6,500 on the invoice and the payment of an excess value charge, all of which clearly show an understanding on the part of GP that the declared value was $6,500 and a willingness to pay a higher rate to obtain the carrier's liability for this higher value.

3. Section 17 of the airbill provides that any action brought on a claim must be brought within one year of written notice that the claim is disallowed in full or in part. Defendant argues that it disallowed claims on four of the shipments more than one year (but less than two) before this suit was filed. As discussed in Division 1, however, the enforceability of this contractual limitation is controlled by federal common law as reflected in the Interstate Commerce Act, and the Act states that a carrier may not provide by contract for a period of less than two years from written disallowance of a claim for bringing an action against it. See 49 USCA § 11707 (e). Thus, the airbill provision requiring any action to be brought within a year of written disallowance is unenforceable, and defendant's argument is without merit.

4. Defendant sent BTL two checks with the following language on the back: "Acceptance and endorsement of this check by the payee acknowledges full settlement and release of all claims against [defendant] . . . ." Because BTL accepted the checks, defendant contends it was released from further liability on at least the two claims referenced on the checks. The record clearly shows, however, that BTL did *not* endorse the checks, as the signature line for endorsement if BTL chose to release defendant was left blank. Consequently, defendant was not released, and this contention is also without merit. The cases cited by defendant for the proposition that an actual endorsement is not required are inapposite because the checks in those cases simply stated that they represented full and complete settlement of a claim and did not have the language requiring endorsement quoted above — language that defendant itself drafted.

5. For these reasons, the trial court properly granted plaintiffs' motion for summary judgment and denied defendant's motion for summary judgment with respect to defendant's

liability for compensatory damages for breach of contract, including pre-judgment interest. See OCGA § 7-4-15. Additionally, the trial court did not err in ruling that questions of fact remained for the jury regarding whether an award of attorney fees was warranted. OCGA § 13-6-11 (expenses of litigation may be awarded plaintiff in contract action where defendant has acted in bad faith, has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense); see also *Spring Lake Property Owners Assn. v. Peacock*, 260 Ga. 80 (390 SE2d 31) (1990) (question of attorney fees under OCGA § 136-11 is question for jury). However, there is no evidence of conversion in the record and punitive damages cannot be awarded for breach of contract. See OCGA § 13-6-10. The trial court therefore erred in denying defendant's motion for summary judgment with respect to punitive damages, and this portion of the trial court's order must be reversed.

Judgment affirmed in part and reversed in part. Birdsong, P.J., and Andrews. J., concur.

APPENDIX L – ORDER OF THE SUPERIOR COURT OF FULTON COUNTY, STATE OF GEORGIA DATED NOVEMBER 10, 1992

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE

NO. D90701

GEORGIA-PACIFIC CORPORATION and BTL SPECIALTY RESINS CORPORATION,

Plaintiffs,

v.

BURLINGTON AIR EXPRESS, INC.

Defendant.

ORDER GRANTING FINAL PARTIAL SUMMARY JUDGMENT TO PLAINTIFFS AND DENYING DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

FINDINGS OF FACT

1.

Plaintiffs Georgia Pacific Corporation ("GP") and BTL Specialty Resins Corporation ("BTL") instituted this litigation by filing their Complaint on June 14, 1991. After receiving an extension of time, Burlington Air Express, Inc. ("Burlington")

timely filed its Answer. The facts underlying this litigation are not in dispute. This Order concerns Plaintiffs' Motion for Summary Judgment as to substantially all of the compensatory damages sought and Defendant's Cross-Motion for Partial Summary Judgment. These Motions were fully briefed and the Court heard oral argument on July 10, 1992.

2.

GP and BTL (collectively "Plaintiffs") are business corporations which, among other things, at all relevant times engaged in the production of formaldehyde. Plaintiffs produced formaldehyde in factories in Hampton, South Carolina. One component used in producing formaldehyde is silver catalyst. After being used in the production of formaldehyde, the scrap silver may be refined and reused in the manufacturing process.

3.

Burlington is a national common carrier that provides transportation of a shipper's property in interstate commerce. From September 1989 to February 1990, BTL and GP contracted with Burlington to ship five (5) shipments of scrap silver used in the manufacture of formaldehyde from Hampton, South Carolina, to Plainville, Massachusetts, where the silver would be refined. After the scrap silver was entrusted to Burlington, Burlington failed to deliver any of the shipments to Plainville, Massachusetts. It is undisputed that the scrap silver was lost or stolen while the shipments were in Burlington's possession. It is also undisputed that GP and BTL specifically declared the values of these shipments on the appropriate airbills and invoices which have been attached to Plaintiffs' Complaint as Exhibits. In one instance, Burlington claims that GP did not set forth a declared

value on an airbill, Exhibit "H" to the Complaint. However, the declared value was listed on the invoice for this shipment, Exhibit "G" to the Complaint, and the declared value does actually appear on the airbill, Exhibit "H," although not in the blank specified, by the instruction "INSURE FOR $6,500.00." Thus, the Plaintiffs put declared values on each of the shipments entrusted to Burlington.

4.

When Plaintiffs made demand upon Burlington to pay the full declared values of the lost shipments of scrap silver, Burlington refused for the stated reason that Burlington's tariff prevented Burlington from accepting these shipments and limited Burlington's liability according to terms set forth in fine print on the back of Burlington's airbills, which incorporated the terms of said tariff. First, Plaintiffs had no actual notice of Burlington's tariff. Second, even if Plaintiffs are charged with notice of the tariff, the language of the tariff itself does allow Burlington to transport precious metals up to a declared value of $25,000 so long as the metals are not ornamental in nature. It is uncontroverted that the scrap silver entrusted to Burlington by Plaintiffs was used in the manufacturing process, and was not ornamental silver. The declared values of each of these shipments did not exceed $25,000.

5.

From the time Burlington lost Plaintiffs' shipments, Plaintiffs entered into negotiations with Burlington, correspondence was exchanged, and telephone conferences were held regarding Burlington's obligation to pay the full declared values of these shipments. Burlington offered partial payments to

GP in amounts Burlington acknowledged it owed even under its tariff. GP rejected these payments. Burlington made partial payments to BTL for two (2) of these shipments. These payments were via checks for amounts Burlington acknowledged that it did owe BTL notwithstanding its defense based on Burlington's tariff. BTL received and cashed checks dated March 27, 1990, in the amount of $673.45, and April 27, 1990, in the amount of $585.02.

6.

On the back of each of these Burlington checks was a statement that, "Acceptance and endorsement of this check by the payee acknowledges full settlement and release of all claims against Burlington Air Express, Inc. and its agents and employees for loss, damage, or delay arising in connection with the shipment covered with the airbill referenced on the check statement." Underneath said language is a line for the payee to sign. Although BTL accepted these two (2) payments, BTL did not endorse or sign these checks in any way. Moreover, Burlington failed to raise any affirmative defense based on release or accord and satisfaction in its Answer. Burlington finally raised these defenses in response to Plaintiffs' Motion for Summary Judgment and in support of Burlington's Cross-Motion for Partial Summary Judgment. Moreover, the copies of the checks were attached without authentication of this documentary evidence in affidavit form. Plaintiffs made a Motion to Strike with the Court based on the insufficiency of this evidence and the waiver of these defenses.

7.

Burlington also raised as a defense to Plaintiffs' Motion for

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Summary Judgment and in support of Burlington's Cross-Motion for Partial Summary Judgment a limitation of action defense. This defense was not raised in Burlington's Answer. This defense is based on certain language contained in fine print on the back of Burlington's airbills. Section 17 of the airbills provides, "Forwarder shall not be liable in any action unless a claim has been filed in such action and brought within one year after the date written notice is given to claimant that forwarder has disallowed the claim in full or in part." Plaintiffs instituted this action on June 14, 1991. Burlington argued that the checks it sent to GP and BTL constituted written notice that it disallowed their claims. Burlington also attached to its Brief two (2) letters it claims were written notice of partial disallowance. However, Burlington failed to proffer these letters via affidavit. Plaintiffs objected by a Motion to Strike based on waiver of this affirmative defense and improper authentication of business records. Moreover, there is correspondence properly proffered by Plaintiffs indicating that Burlington did not finally deny GP's claims until August 20, 1990. Burlington did not finally deny BTL's claims until August 20, 1990. Litigation was instituted within one (1) year of these dates.

CONCLUSIONS OF LAW

1.

The facts underlying this litigation are not in dispute. This litigation involves interpretation of contracts, a matter of law for the Court particularly well-suited for summary adjudication. The Court finds that federal law based upon the Interstate Commerce Act applies to this litigation as Burlington is a carrier in interstate commerce. Burlington initially submitted to the Court that this act was applicable in trying to set forth certain affirmative

defenses, not set forth in Burlington's Answer, in response to Plaintiffs' Motion for Summary Judgment. Specifically, Burlington relied on the Interstate Commerce Act in attempting to fashion a limitations defense based on the language on the back of its airbills that suit must be instituted within one (1) year after Burlington denied Plaintiffs' claims. Plaintiffs demonstrated that the limitation period under the Interstate Commerce Act had to be two (2) full years. 49 U.S.C. § 11707(e). In response, Burlington changed its position on the applicability of the Interstate Commerce Act, arguing that pursuant to 49 U.S.C. § 10526(a)(8)(B), Burlington is now exempt from the jurisdiction under the Interstate Commerce Act. While it may be literally true that air cargo carriers such as Burlington are exempt from the jurisdiction of the Interstate Commerce Act, in that its industry has been deregulated, the Court finds persuasive the line of authority found in the case of *First Pennsylvania Bank N.A. v. Eastern Airlines Inc.*, 731 F.2d 1113 (3d Cir. 1984). In a well-reasoned opinion discussing the effect of deregulation on air carriers that ship goods in interstate commerce, the court held that substantive provisions, such as statute of limitations, still applied notwithstanding the regulation. Deregulation primarily allowed air carriers freedom to compete via rates. Thus, the Interstate Commerce Act applies to Burlington's attempts to limit its liability to Plaintiffs.

2.

The public policy contained in the Interstate Commerce Act strongly favors holding carriers liable for the loss of goods shipped. *Flying Tiger Line Inc. v. Pento Trucking Serv. Inc.*, 517 F. Supp. 1108 (E.D. Pa. 1991). Plaintiffs established an undisputed case on the loss of their five (5) shipments of scrap silver. Thus, the burden shifts to Burlington to show why it is not

liable for the full declared values of these shipments. *S.C. Johnson & Son, Inc. v. Louisville & Nashville R. Co.*, 695 F.2d 253 (7th Cir. 1982). Burlington has failed to carry this burden.

3.

The Court finds Burlington's defense based on the language of its tariff to be meritless. This is the only apparent affirmative defense in Burlington's Answer. Most importantly, the language of the tariff allows Burlington to transport Plaintiffs' scrap silver. However, since Plaintiffs had no actual notice of the tariff, even if the tariff prevented transportation of scrap silver, Burlington probably could not limit its liability in this manner. *First Pennsylvania Bank. N.A. v. Eastern Airlines Inc.*, 731 F.2d 1113 (3d Cir. 1984). Moreover, in the Eleventh Circuit, when Plaintiffs declared the value of their shipments on the airbills, Burlington could not rely on contrary terms in fine print or in the tariff to argue Plaintiffs agreed to a lesser value. *Bio-Lab, Inc. v. Pony Express Courier Corp.*, 911 F.2d 1580 (11th Cir. 1990).

4.

Burlington has recently raised two (2) affirmative defenses, to wit, statute of limitations and release/accord and satisfaction. With respect to Burlington's statute of limitations defense, the Court finds that Plaintiffs had a two (2) year period to institute litigation despite the one (1) year provision on the back of Burlington's airbills due to the requirements of the Interstate Commerce Act and 49 U.S.C. § 11707(e). Plaintiffs instituted suit well within this two (2) year period. Alternatively, the Court finds that by not raising the statute of limitations defense in its Answer, Burlington has waived the defense. O.C.G.A. § 9-11-8(c). Plaintiffs were surprised at Burlington's raising of this defense at

such a late stage in this litigation. To allow Burlington to raise this defense at the late date would prejudice Plaintiffs. *Slappey Builders v. FDIC,* 157 Ga. App. 343, 347 (1981). Burlington offered no excuse why it did not initially raise this defense. The facts upon which this defense is based was clearly known by Burlington from the beginning. Additionally, Burlington failed to properly authenticate the relevant documents for this defense by affidavit. O.C.G.A. § 9-11-56(e). Plaintiffs objected to this proffer in Plaintiffs' Motion to Strike. Finally, the Court finds that Burlington did not finally deny Plaintiffs' claims until within one (1) year of suit being instituted. Thus, even assuming the one (1) year limitations period, Plaintiffs instituted litigation within said period. Regardless, the Court finds that checks constituting partial payment are not notices of disallowance. *Capon Textile Trading Co. v. Consolidated Rail Corp.,* 538 F. Supp. 1083 (S.D.N.Y. 1982).

5.

Burlington's defense based on release/accord and satisfaction also fails as a matter of law. This defense only applies to two (2) shipments out of the five (5) shipments, belonging to BTL. BTL accepted two (2) checks as partial payment for these shipments. First, the Court finds that the language offered by Burlington required BTL to both accept and *endorse* the checks to agree to any compromise of BTL's claims against Burlington. A signature line was provided. BTL refused to endorse these checks in any way. Burlington drafted the restrictive language on the back of its checks. The language is construed against Burlington. *Flying Tiger Line Inc. v. Penso Trucking Serv., Inc.,* 517 F. Supp. 1108 (E.D. Pa. 1981). Thus, no release occurred as a matter of law because BTL refused to agree to Burlington's terms. Second, there is no consideration for such a defense.

Burlington merely paid BTL what it admitted owing BTL despite the language in its tariff. *McLendon v. Johnson*, 69 Ga. App. 214 (1943) (case overruled on another legal issue, *Barfield v. Hilton*, 238 Ga. 150, 152 (1977)). No accord and satisfaction occurred because there is no bona fide dispute as to Burlington's liability for the full value of these shipments. O.C.G.A. § 13-4-103(b). Moreover, Burlington waived the release of release/accord and satisfaction by failure to raise it in its Answer. O.C.G.A. § 9-11-8(c). Burlington raised these defenses too late in the litigation. Allowing these defenses would prejudice Plaintiffs when the facts were known from the very beginning by Burlington. *Slappey Builders v. FDIC*, 157 Ga. App. 343, 347 (1981). Moreover, Burlington did not proffer the documents upon which it bases these defenses in a receivable manner. Plaintiffs objected to the proffering of these materials without the appropriate affidavit authenticating these documents as business records in Plaintiffs' Motion to Strike. O.C.G.A. § 9-11-56(e). Burlington proffered the Affidavit of Steven Shipler, but the record indicates that there was a failure to attach business records to the Affidavit as required by Georgia law although the Affidavit referred tc said records. Further the Affidavit purported to be in support of Burlington's Cross-Motion for Partial Summary Judgment. The Affidavit did not purport to be in opposition to Plaintiffs' Motion for Summary Judgment. Georgia law and O.C.G.A. § 9-11-56(c) require that an affidavit in support of a motion for summary judgment be properly put in the record thirty (30) days before the time fixed for the hearing. Burlington had much more than thirty (30) days in which to have this Affidavit on file. Indeed, the record reflects that Burlington had a full two (2) months to have this Affidavit on file thirty (30) days before the hearing, but failed to do so.

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6.

Burlington's defense that there is no declared value for one of the shipments is without merit. The shipment at issue is a GP shipment reflected in the invoice and airbill attached to Plaintiffs' Complaint as Exhibits "G" and "H," respectively. An examination of these Exhibits shows the declared value recorded on the invoice, and a value placed upon the airbill. Although the declared value is not in the exact location on the airbill, it is clear that Burlington was given notice in writing of the declared value. Thus, this attempted limitation of liability finds no support as a matter of fact. Moreover, any failure to charge an excess value charge is solely the failure to Burlington, and in no way relieves or lessens Burlington's liability to Plaintiffs. *Bio-Lab, Inc. v. Pony Express Courier Corp.*, 911 F.2d 1580 (11th Cir. 1990).

7.

Plaintiffs pray for prejudgment interest, attorneys' fees, and punitive damages. Burlington argues that these damages are not recoverable. The Interstate Commerce Act at 49 U.S.C. § 10103 provides that, "[e]xcept as otherwise provided in this subtitle, the remedies under this subtitle [Interstate Commerce Act] are in addition to remedies existing under another law or at common law." There is no provision in the Interstate Commerce Act prohibiting a shipper from recovering against a carrier prejudgment interest, attorneys' fees, or punitive damages. Thus, the Court finds the better line of cases allow recovery of these damages. *Troute v. Aero Mayflower Transit Co.*, 89 Or. App. 564, 718 P.2d 745 (1986); *A.T. Clayton & Co. v. Missouri-Kansas-Texas R. Co.*, 901 F.2d 833 (10th Cir. 1990); *Coliseum Cartage Co. v. Carlen Distribution System, Inc.*, 732 F. Supp. 1340 (M.D.N.C. 1989). Regardless, Burlington has been deregulated

from the Interstate Commerce Act. The Court finds that to make Plaintiffs whole, Plaintiffs are entitled at this summary adjudication stage to an award of prejudgment interest assessed at the statutory rate of seven percent (7%) per annum. O.C.G.A. §§ 7-4-2; 7-4-15. Plaintiffs can offer proof at trial to attempt to recover punitive damages and attorneys' fees.

8.

The Court finds that there are no genuine issues of material fact and that Plaintiffs are entitled to judgment as a matter of law. Thus, Plaintiffs' Motion for Summary Judgment is GRANTED. Plaintiff GP is entitled to a judgment against Burlington in the amount of $13,000.00 for principal and $2,509.39 for prejudgment interest, for a total judgment of $15,509.39. Plaintiff BTL is entitled to a judgment against Burlington in the amount of $22,741.53 for principal and $4,358.90 for prejudgment interest, for a total judgment of $27,100.43. Postjudgment interest shall accrue thereupon at the statutory rate. Pursuant to O.C.G.A. § 9-11-54(b), the Court directs entry of final judgment on the above-stated amounts because there is no just reason for delay. The Clerk is ORDERED to issue Fi Fa's in these amounts. Defendant's Cross-Motion for Partial Summary Judgment is DENIED. Plaintiffs will be allowed to proceed to trial to present their claims for punitive damages and attorneys' fees.

SO ORDERED, this 10th day of November, 1992-

s/ Thelma Wyatt-Cummings
HONORABLE THELMA WYATT-CUMMINGS
JUDGE
Superior Court of Fulton County

Appendix L

Presented by:

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